No._____

United States Circuit Court of Appeals

For the Ninth Circuit

HELMET P. LOYNING and JOHN ZWEIMER,

Respondents and Appellants,

vs.

B. P. LOYNING,

Petitioner and Appellee.

APPELLEE'S BRIEF

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THURBER'S HELENA

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STATEMENT OF THE CASE

The history of the litigation leading up to this contempt proceeding is somewhat involved, and it is therefore believed desirable, for a clearer understanding of the issues in this case, to discuss the evidence in greater detail than is set forth in appellants' brief.

In this proceeding the appellants, Helmet P. Loyning and John Zweimer, are charged by the appellee, B. P. Loyning, with contempt of court for violating the decree of the Circuit Court of the United States, Ninth Judicial Circuit, District of Montana, in cause No. 666, which decree was entered on the 28th day of May, 1906 (Tr. 88-91). That was a suit brought by W. A. Morris against several defendants, including W. R. Bainbridge and C. H. Young, predecessors in interest of Helmet P. Loyning

and John Zweimer, respectively, to enjoin the defendants from interfering with the flow of water in Sage Creek and its tributaries. T. N. Howell, predecessor in interest of B. P. Loyning, filed a complaint in intervention in said action (Tr. 50-59) claiming a water right subsequent to that of the plaintiff but prior to that of each of the defendants. At that time Howell was appropriating water from Sage Creek at a point in the state of Wyoming and the defendants were appropriating water from Piney Creek in Montana. In the pleadings filed in that action it was admitted that Piney Creek was a tributary of Sage Creek (Tr. 63, 64, 65-66, 68, 70, 71, 101). The decree in that action awarded Howell, predecessor in interest of B. P. Loyning, "one hundred and ten inches of the waters of Sage Creek and its tributaries . . . . prior in time to any and all of the defendants" and perpetually enjoined the defendants and their successors in interest "from in any manner interfering" with said right (Tr. 89). There was no specific finding by the court that Piney Creek was a tributary of Sage Creek since this was admitted in the pleadings, but the court in its opinion stated that Piney Creek was a tributary of Sage Creek (Tr. 94) and that the defendants were enjoined from taking water from Piney Creek to the prejudice of the rights of Howell (Tr. 96). This decision was thereafter appealed and affirmed by the Circuit Court of Appeals, 86 C. C. A. 519, 159 Fed. 651, and by the United States Supreme Court, 221 U. S. 485, 55 L. Ed. 821.

This Federal Court decree of 1906 did not decree the rights of the defendants among themselves so thereafter

in 1907 in a suit in the District Court of Carbon County, State of Montana, the rights of the defendants as between themselves in the waters of Piney Creek was adjudicated (Tr. 120-125). Neither B. P. Loyning nor his predecessors in interest were parties to that suit.

Thereafter in 1919 predecessors in interest of B. P. Loyning moved the Howell point of diversion from Sage Creek in Wyoming upstream 15 miles to a point in Montana where water was taken from Piney Creek. Contempt proceedings were then instituted in 1919 in Federal Court in this cause No. 666 by predecessors in interest of B. P. Loyning against predecessors in interest of Helmet P. Loyning, and Judge Bourquin, who presided in this contempt matter, found the defendant guilty of contempt for interfering with complainants' prior rights, and found that the above change of diversion was a benefit to defendant (Tr. 104-112).

> "At the times complained of the use of Howell's right on complainants' lands obviously required less of the natural flow than when used on Howell's lands some 15 miles farther down stream. Hence the change did not injure but benefitted respondents." (Tr. 109.)

This change in point of diversion was prior to that contempt proceeding.

Thereafter, in 1939, Helmet P. Loyning and a predecessor in interest of John Zweimer brought suit in the District Court of Carbon County, State of Montana, against B. P. Loyning seeking an adjudication that B. P. Loyning had no rights in the waters of Piney Creek and

seeking to enjoin him from appropriating water from Piney Creek (Tr. 167-176). B. P. Loyning filed his answer in said action (Tr. 147-166) and asserted that Piney Creek was a tributary of Sage Creek (Tr. 151, 161), pleaded the Federal Court decree of 1906 giving him a prior right to the waters of Sage Creek and its tributaries (Tr. 151, 161), alleging that the state court was without jurisdiction in the matter (Tr. 158), admitting the change in point of diversion from Sage Creek in Wyoming to Piney Creek in Montana (Tr. 153, 163) and denying that such change in point of diversion injured the plaintiffs (Tr. 154, 164). Plaintiffs in their reply (Tr. 136-146) denied that Piney Creek was a tributary of Sage Creek (Tr. 137, 143) and alleged that plaintiffs were damaged by the change in point of diversion (Tr. 140, 145). The state court found that Piney Creek was not a tributary of Sage Creek (Tr. 131, 132) contrary to the Federal Court decree of 1906, found that the change in point of diversion damaged the plaintiffs (Tr. 131-132), contrary to the findings of the Federal Court in the contempt decree of 1919, and found that plaintiffs' rights in Piney Creek were superior to defendant's and perpetually enjoined B. P. Loyning from taking water from Piney Creek to the detriment of plaintiffs (Tr. 133-134). On appeal to the Supreme Court of the State of Montana the judgment was affirmed (Tr. 178-207) on January 8, 1946, the court declining to pass on the question whether the Federal Court decree of 1906 was res judicata that Piney Creek was a tributary of Sage Creek (Tr. 197).

Thereafter, in the middle of June, 1946, Helmet P. Loyning and John Zweimer objected to B. P. Loyning taking any water from Piney Creek (Tr. 114). B. P. Loyning demanded of both Helmet P. Loyning and John Zweimer that they allow him to take water from Piney Creek to supply his rights under the Federal Court decree of 1906, but they refused (Tr. 114, 247), relying on the opinion of the Supreme Court of Montana (Tr. 215, 247).

B. P. Loyning then on July 11, 1946, instituted this contempt proceeding charging Helmet P. Loyning and John Zweimer with violating the Federal Court decree of 1906 (Tr. 3-10).

Helmet P. Loyning and John Zweimer filed separate answers (Tr. 12-22, 23-25), wherein they alleged that Piney Creek was not a tributary of Sage Creek, that they were damaged by the change in point of diversion, and pleaded the State Court decree as a defense to the action.

B. P. Loyning filed separate replies to these answers denying that Piney Creek was not a tributary of Sage Creek, denying that appellants were damaged by the change in point of diversion and alleging that the State Court decree was void since that court had no power or jurisdiction to review, vacate or annul the Federal Court decree of 1906 (Tr. 25-30).

The Court, the Honorable Charles N. Pray presiding, found all issues in favor of the appellee and adjudged appellants to be in contempt (Tr. 272-283).

This is an appeal by the appellants from that judgment.

QUESTIONS INVOLVED

1. Whether or not the state court decree is a defense to this action?

2. If not, then whether or not Piney Creek is a tributary of Sage Creek and whether or not the change in point of diversion of the Howell right from Sage Creek to Piney Creek injured the appellants?

3. Whether or not the assertion of rights in conflict with a court injunction constitutes a contempt?

SUMMARY OF ARGUMENT

When a judgment of another court is relied upon as a defense to an action, the court may inquire into the jurisdiction of such court rendering such judgment. The state court judgment was void since a state court has no power to review, modify or annul a prior Federal Court decree. The suit in Federal Court in 1906 was an action in rem to adjudicate water rights. The Federal Court in such actions retains jurisdiction to enforce its decrees to the exclusion of any other court. The state court had no power to interfere with the jurisdiction of the Federal Court first acquired and its decree was therefore void and no defense to this action.

A change of conditions may be a defense to a contempt proceeding, but the burden of proving a change of conditions is upon the parties who rely thereon. The evidence discloses that Piney Creek is a tributary of Sage Creek and there is no evidence that appellants were in-

jured by the change in point of diversion from Sage Creek to Piney Creek. The mere fact that a point of diversion is changed from the main stream to a tributary of such stream does not amount to injury per se to junior appropriators from the tributary.

The appellants, by asserting prior rights in the waters of Piney Creek under the state decree, violated the Federal Court injunction of 1906. Their actions as effectively deprived appellee of water as would have been the case if they had blocked off appellee's point of diversion or diverted all of the water above appellee's point of diversion. Appellee could not safely divert the water in the face of appellants' refusal, for fear of being in contempt of the state court decree.

ARGUMENT

1. *The State Court Decree of 1944 Is Void for Want of Jurisdiction and Is No Defense to This Proceeding.*

The state court decree of 1944 (Tr. 127-135) found that Piney Creek was not a tributary of Sage Creek (Tr. 131-132), and that the change in point of diversion from Sage Creek to Piney Creek damaged the appellants (Tr. 131-132) and held that the appellants' had prior rights in Piney Creek to those of appellee (Tr. 133-134). Appellants rely on this decree as a defense to this proceeding.

It is a well recognized rule of law that when a judgment of one court is offered as a defense to an action in another court, the latter court may inquire into the jurisdiction of the former over the parties or subject matter.

"When a judgment recovered in a state court is offered as a cause of action or as a defense in a federal court, the latter court may inquire into the jurisdiction of the former; and the effect of the judgment will avoided if it is shown that the court rendering it lacked jurisdiction of the parties or of the subject matter. The rule is applicable even when the question is raised in a federal court sitting in the same state."

34 C. J. 1159.

Cooper v. Brazelton, 135 Fed. 476, 479.

In re Philadelphia Rapid Transit Co., 117 Fed. (2d) 730, 733.

Clearly this court may inquire as to the jurisdiction of the state court over the subject matter of the action relied upon by appellants as a defense to this proceeding.

The decree of the state court is in direct conflict with the Federal Court decree of 1906 perpetually enjoining appellants' predecessors in interest from interfering with the Howell right to "the waters of Sage Creek and its tributaries" (Tr. 89). The findings of the state court were directly opposed to the opinion of Judge Whitson declaring that Piney Creek was a tributary of Sage Creek (Tr. 94, 96) and to the admission of appellants' predecessors (Tr. 63, 64, 65-66, 68, 70, 71, 101) that Piney Creek was a tributary of Sage Creek. The finding of the state court that the change in point of diversion injured appellants is directly opposed to the findings of Judge Bourquin in the contempt proceeding of 1919 (Tr. 109). Appellee in the state court challenged the jurisdiction of the state court (Tr. 158), but the latter chose to ignore

the prior jurisdiction of the Federal Court over the subject matter of the action.

It is well recognized that a state court has no jurisdiction to review, modify or annul the judgments or decrees of a Federal Court. Rather, an action to review a judgment can be brought only in the court which rendered the judgment.

> "While a state court cannot ordinarily review, annul, or modify the judgments or decrees of a federal court, or interfere with the execution thereof, it may grant relief where there has been fraud on the federal court in procuring the judgment."
> 21 C. J. S. 832.

> "nor can a decree of a federal court be reviewed, annulled, or corrected by a state court, but application should be made to the court which has rendered such decree."
> 15 C. J. 1176.

> "An action to review a judgment can be brought only in the court which rendered the judgment."
> 34 C. J. 404.

See also:

In re Rochester Sanitarium & Baths Co., 222 Fed. 22, 26.
Whayne v. McBirney, (Okl.) 157 P. (2d) 161, 163.
Fidler v. Gilchrist, (Ind.) 109 N. E. 796.
Kurtz v. Phila. & R. R. Co., (Pa.) 40 A. 988.
Gulf M. & N. R. Co. v. Hill Mfg. Co., (Miss.) 90 So. 358.

The suit in the state court was similar to a bill of review which is an old equity proceeding by which a party may obtain a review and reversal or correction of a decree of a court after it has become final.

30 C. J. S. 1049.
19 Am. Jur. 290.

New matter is one of the grounds recognized for such a bill of review.

30 C. J. S. 1069.
19 Am. Jur. 294.

Appellants, in instituting the action in state court were in effect seeking a bill of review of the Federal Court decree of 1906 and were relying on the change in point of diversion as new matter justifying a modification of that decree. But a state court has no jurisdiction of a bill to review a Federal Court decree. A bill of review can only be filed in the court which rendered the decree sought to be reviewed.

> "The remedy afforded by bill of review is confined to courts of equity. Moreover, such a bill may not be entertained by a court other than that which rendered the decree sought to be reviewed."
>
> 19 Am. Jur. 292.

> "A federal court has jurisdiction of a bill of review if it had jurisdiction of the original cause; but it has no power thus to review a decision of a state court."
>
> 30 C. J. S. 1054.

See also:

Nelson v. Bailey, (Mass.) 22 N. E. (2d) 116, 119.
People v. Sterling, (Ill.) 192 N. E. 229.

Furthermore, the suit in Federal Court in 1906 was an action in rem, similar to a suit to quiet title.

Whitcomb v. Murphy, 94 Mont. 562, 566, 23 Pac. (2d) 980 and cases cited therein.
State ex rel. Reeder v. Dist. Ct., 100 Mont. 376, 380, 47 Pac. (2d) 653.
Sain v. Montana Power Co., 20 F. Supp. 843.

In the last cited case it is said:

"In brief consideration of water rights and suits to adjudicate them, a water right and its exercise are hereditaments, corporeal and incorporeal. Smith v. Denniff, 24 Mont. 20, 25, 60 P. 398, 50 L. R. A. 737, 81 Am. St. Rep. 408. They are real property. Adamson's Case (Adamson v. Black Rock Power & Irrigation Co.), 12 F. (2d) 437 (C. C. A.). Suits to adjudicate them are to quiet title to realty. Rickey Land & Cattle Co. v. Miller & Lux (C. C. A.) 152 F. 11, 15, affirmed 218 U. S. 258, 31 S. Ct. 11, 54 L. Ed. 1032. *Such suits are not in personam but in rem or quasi in rem,* for that, though directed against defendants personally, the real object is to deal with and settle and protect title to and enjoyment of particular property, and to invalidate unfounded claims asserted thereto. And that converts actions otherwise in personam into actions in rem or quasi in rem. See 1 C. J. 929 and cases; 51 C. J. 141, 281 and cases; Pennoyer v. Neff, 95 U. S. 714, 734, 24 L. Ed. 565." Italics ours.)

The Federal Court, having rendered a final decree in 1906 permanently enjoining appellants from diverting waters of Piney Creek to the injury of appellee, retains jurisdiction to open, vacate or modify that decree upon a showing of facts making it equitable to do so.

43 C. J. S. 956, Section 218.

Only the court decreeing this permanent injunction has the power to open, vacate or modify it, it being well recognized that the court which first acquires jurisdiction of a suit in rem may maintain and exercise it to the exclusion of any other court until it has finally and completely disposed of the matter, and another court may not so exercise its jurisdiction as to frustrate or interfere with the jurisdiction first acquired.

> "In Baltimore & O. R. Co. v. Wabash R. Co., 57 C. C. A. 322, 119 Fed. 680, the circuit court of appeals for the seventh circuit said:
>
> " 'It is settled that when a state court and a court of the United States may each take jurisdiction of a matter, the tribunal whose jurisdiction first attaches holds it, to the exclusion of the other, until its duty is fully performed, and the jurisdiction involved is exhausted, ... The rule is not only one of comity, to prevent unseemly conflicts between courts whose jurisdiction embraces the same subject and persons, but between state courts and those of the United States it is something more. "It is a principle of right and law, and therefore of necessity. It leaves nothing to discretion or mere convenience." Covell v. Heyman, 111 U. S. 176, 28 L. Ed. 390, 4 Sup. Ct. Rep. 355. The rule is not limited to cases where property has actually been seized under judicial pro-

cess before a second suit is instituted in another court, but it applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in all suits of a like nature. Farmers' Loan & T. Co. v. Lake Street Elev. R. Co., 177 U. S. 51, 44 L. Ed. 667, 20 Sup. Ct. Rep. 564; Merritt v. American Steel Barge Co., 24 C. C. A. 530, 49 U. S. App. 85, 79 Fed. 228.' "

Kline v. Burke Construction Co., 260 U. S. 226, 67 L. Ed. 226, 230-231, 43 S. Ct. 79.

See also, to the same effect,

Princess Lida v. Thompson, 305 U. S. 456, 59 S. Ct. 275, 83 L. Ed. 285.

Black Panther Oil & Gas Co. v. Swift, (Okl.) 170 Pac. 238.

Consequently the state court has no power to assume jurisdiction in this matter. A suit to adjudicate water rights is in rem and where a perpetual injunction is issued the court so decreeing retains jurisdiction over the matter to modify or annul said decree if conditions so warrant. The state court had no power to assume jurisdiction in this matter so as to interfere with and frustrate the continuing jurisdiction of the Federal Court which was first acquired in this in rem proceeding.

The principles above set forth have been recognized and applied in water right suits. In Rickey Land & C. Co. v. Miller & Lux, 218 U. S. 258, 54 L. Ed. 1032, it was held that a Federal Court in Nevada and a state court in California have concurrent jurisdiction to determine the relative rights of parties claiming, one in Nevada and

one in California, to be entitled to appropriate, as against each other, the waters of an interstate stream, and whichever court first acquires jurisdiction is entitled to proceed to final determination without interference from the other. The court said:

> "We are of the opinion, therefore, that there was concurrent jurisdiction in the two courts, and that the substantive issues in the Nevada and California suits were so far the same that the court first seised should proceed to the determination without interference, on the principles now well settled as between the courts of the United States and of the states. Prout v. Starr, 188 U. S. 537, 544, 47 L. ed. 584, 587, 23 Sup. Ct. Rep. 398; Ex parte Young, 209 U. S. 123, 161, 162, 52 L. ed. 714, 730, 13 L. R. A. (N.S.) 932, 28 Sup. Ct. Rep. 441."

These rules have also been applied in water right suits as between different courts of the same state. The same rules as to priority and retention of jurisdiction apply as between courts of the same state (21 C. J. S. 745) as apply as between state courts and federal courts (21 C. J. S. 808). In Consolidated H. S. Ditch & R. Co. v. New Loveland & G. Irr. & L. Co., (Colo.) 62 Pac. 364, suit was brought in the District Court of Boulder County to enjoin an interference with plaintiff's priority to the use of water as established by an earlier decree of that court. The defendant pleaded as a defense a subsquent judgment in his favor rendered by the District Court of Larimer County. The court held that the latter judgment was void.

". . . we are of opinion that since it is conceded, and appears of record, that the district court of Boulder County properly obtained jurisdiction of the proceedings which culminated in the decree of 1883, the district court of Larimer county did not, in the action which is relied upon in the fourth defense, have the power to review the decree of the district court of Boulder county, and that its attempt so to do was wholly without jurisdiction, and its judgment therein void. It follows from the foregoing that the judgment below should be affirmed; and it is so ordered. Affirmed."

In Weiland v. Reorganized Catlin Consol. Canal Co., (Colo.) 156 Pac. 596, an action was brought in the District Court of Otero County seeking to enjoin the water commissioners from distributing water otherwise than as adjudicated in an earlier case by the District Court of Bent County. The court held that only the court which originally adjudicated the water rights had jurisdiction in the matter.

"Which court is vested with authority to determine this question?

"If the district court of Otero county had jurisdiction for this purpose, it must, as it did, construe the decree of the Bent county district court, and do, as it did, render judgment directing the water officials to distribute the priority fixed by that decree in harmony with such constructions. Whether such construction and judgment are right or wrong is immaterial. The question is: When a court vested with jurisdiction to adjudicate water rights has exercised that authority and entered a decree, can another court of co-ordinate jurisdiction entertain a case the

object of which is to determine whether the water officials have complied with its terms in the distribution of water? The statutes designate the district court vested with exclusive jurisdiction to adjudicate priorities to the use of water for irrigation in a water district. When jurisdiction for that purpose has attached and a decree is entered, the statutes on that subject necessarily inhibit any other court of co-ordinate jurisdiction from modifying, reviewing, or construing such decree, otherwise there could be, in effect, more than one decree by different courts affecting the same priority to the use of water in the same water district, which it is the object of the statutes to avoid. * * * * * *The enforcement of a decree establishing a priority to the use of water is of the very essence of adjudication proceedings. From its nature and object the process of enforcing it is continuous, and must therefore remain the continuing function of the court entering it.* Consequently, if a question arises between the owner of a priority fixed by a decree and water officials charged with the duty of distributing water under it, with respect to its meaning or effect, it must be determined by the court entering the decree, and not by any other court of co-ordinate jurisdiction.

"To conclude that any other court than the original one could entertain jurisdiction in such circumstances would lead to hopeless confusion and conflict in jurisdiction. * * * Aside from this, the general rule applicable is that when a court assumes jurisdiction of a proceeding, which it is authorized to entertain, its jurisdiction is exclusive and extends to the enforcement of its decree in so far as the authority of other courts of the same jurisdiction may be involved. Louden Canal Co. v. Haney Ditch Co.,

supra; Bailey on Jurisdiction, § 77; Works on Courts and Their Jurisdiction, 69. We therefore conclude that the district court of Otero county was without jurisdiction to entertain the cause, and the demurrer to the complaint challenging its jurisdiction should have been sustained." (Italics ours.)

This decision is cited with approval or quoted from in the following cases:

El Paso & R. I. Ry. Co. v. Dist. Ct., (N. Mex.) 8 Pac. (2d) 1064, 1067.

Bijou Irr. Co. v. Lower Latham Ditch Co., (Colo.) 184 Pac. 292.

Farmers Ditch Co. v. Boyd Lake R. & I. Co., (Colo.) 178 Pac. 561.

In Hazard v. Joseph W. Bowles Reservoir Co., (Colo.) 287 Pac. 854, 855, it is said:

"The district court of Douglas county first acquired jurisdiction to adjudicate the relative priorities of right to the use of water for irrigation in this district, and it has entered its decree awarding to the parties in this action their relative priority rights to the use of water in this reservoir. No other district court in this state has the jurisdiction thereafter to adjudicate such matters. The district court of Douglas county, having first obtained jurisdiction to adjudicate priorities to the use of water for irrigation in that district, thereafter retains exclusive jurisdiction over the subject matter of such priorities."

* * *

"It is too clear for argument that the district court of Arapahoe county, in rendering the decree in the action now before us, not only assumed to interpret

> and construe and modify the decree of the district court of Douglas county, which was the only court that has jurisdiction in the premises, but, in effect, set it aside, nullified it, and absolutely deprived the defendants of the right to use any of the water, in any circumstances, impounded in the Bennet reservoir.
>
> "The judgment of the district court is therefore set aside and held for naught."

See also Louden Irrigating Canal Co. v. Handy Ditch Co., (Colo.) 43 Pac. 535.

The above cited cases are positive authority that the priority of water rights as between appellants and appellee having been first adjudicated by the Federal court in 1906, no other court thereafter has jurisdiction in an action concerning those adjudicated rights. If appellants contend that appellee's change in point of diversion prejudices their rights, that issue can be litigated only by the Federal Court which originally adjudicated those rights.

The only case found taking a contrary position and which appellants cite is Sain v. Montana Power Co., 84 Fed. (2d) 126. That was an action commenced in the District Court of the United States for the District of Montana, Judge Bourquin presiding (the same Judge who presided in the contempt proceeding of 1919), seeking to enjoin the defendant from changing its point of diversion. The rights in the stream were originally adjudicated in the state court and Judge Bourquin held that he had no jurisdiction in the matter by reason of the prior and continuing jurisdiction of the state court (Sain v. Mon-

tana Power Co., 5 F. Supp. 792). The judgment was reversed on appeal to this court, the court pointing out that in Montana, after water rights have been adjudicated, the parties may bring actions concerning such rights in actions distinct from the cause in which the rights were originally adjudicated. The cases of State ex rel. Boston & Montana etc. Mining Co. v. Clancy, 30 Mont. 193, 76 Pac. 10, Mannix & Wilson v. Thrasher, 95 Mont. 267, 26 Pac. (2d) 373, and Thrasher v. Mannix & Wilson, 95 Mont. 273, 26 Pac. (2d) 370 are cited. It is true that those cases recognize that after water rights have been adjudicated, suits distinct from the original action may be maintained, in the sense that distinct Cause Numbers are assigned to them. But that entirely begs the issue. The question is whether such subsequent actions may be tried in a different court from that in which the rights were originally adjudicated. In each of the cited cases the subsequent litigation was tried in the same court which had previously adjudicated the question, and according to the decisions heretofore cited, that is the procedure which must be followed. It is further submitted that the Court was in error in holding that the suit was in personam. The mere fact that injunctive relief is sought in an action to adjudicate water rights does not convert an action in rem into one in personam.

Thereafter the cited case (Sain v. Montana Power Co.) was heard by Judge Bourquin and dismissed since there was no showing of injury from the change in place of diversion. Judge Bourquin's entire opinion is devoted to an exhaustive criticism of the opinion of this court, and

we commend it to the consideration of the court (Sain v. Montana Power Co., 20 F. Supp. 843).

A subsequent opinion of the Montana Supreme Court, State ex rel. Swanson v. Dist. Ct., 107 Mont. 203, 82 Pac. (2d) 779, shows clearly that once water rights have been adjudicated, subsequent actions dealing therewith, although distinct from the original action, must be commenced in the same court. In that case the District Court of Cascade County adjudicated water rights to streams flowing in Cascade, Teton and Lewis and Clark counties. Thereafter it was sought in the District Court of Lewis and Clark County to secure the appointment of a water commissioner to distribute waters under this decree. It was held that the latter court had no jurisdiction in the matter.

> "Sun River and its tributaries flowing, as they do, in three counties, viz., Lewis and Clark, Teton and Cascade, the district court of any one of those counties has jurisdiction to adjudicate the water rights of the whole watershed system. (Whitcomb v. Murphy, 94 Mont. 562, 23 Pac. (2d) 980.) But of the three, the court which first acquired jurisdiction—here the district court of Cascade county—retains jurisdiction for the purpose of disposing of the whole controversy, and no court of co-ordinate power is at liberty to interfere with its action. (15 C. J. 1134.)
>
> * * *
>
> "Counsel for relators contend that even though the district court of Cascade county be conceded to have exclusive jurisdiction to adjudicate the rights of all parties to the waters of Sun River and its tributaries, it does not follow that that court has exclusive

jurisdiction to enforce the decree. With this contention we do not agree."

The court then quoted at length from Weiland v. Reorganized Catlin Con. Canal Co., (Colo.) 156 Pac. 596, herefore discussed and quoted in this brief.

It is submitted that the state court decree relied upon as a defense to this action is void. That court had no jurisdiction to interfere with the jurisdiction of the Federal Court first acquired, and to review and annul the Federal Court decree of 1906.

Even if the State court decree were valid, it would be no defense to this action. De La Mater v. Graves, (Colo.) 193 Pac. 552, is a case somewhat similar in principle. There it appeared that the plaintiff in error had obtained a divorce from the respondent in New Mexico, the decree providing that the plaintiff in error was to have custody of the minor children for one month. Plaintiff in error then sued in Colorado to enforce this decree and the Colorado court awarded the custody of the children to the plaintiff in error for 30 days, at the end of which time they were to be returned to the respondent. Plaintiff in error did not return the children to the respondent at the end of the 30 days and he was cited for contempt. He pleaded as a defense that the New Mexico decree had subsequently been modified, awarding the children to him unconditionally and absolutely. The court held that this was no defense to the contempt proceedings.

"Assuming that the second New Mexico decree was such as thus pleaded, and that it was proven in the contempt proceedings, the question to be deter-

mined is whether the plaintiff in error could rely upon such decree of a foreign state as a defense in these contempt proceedings.

"The order which the plaintiff in error disobeyed was that he could within 30 days return and deliver the minor children to their mother at Durango, Colo. This order he was bound to obey unless and until the court making it should vacate it in the meantime. No court in another state could affect that order. A foreign court could not expressly vacate or annul it. 15 C. J. 1184. It follows from this that no court of a sister state could affect an order of a court in this state by making some order in conflict, or rendering some decree inconsistent therewith. The order in question was valid when made, and valid when disobeyed, and the rendition of the second New Mexico decree affords no defense in this contempt proceeding.

"Assuming that the Colorado court was bound to give full force and effect to the New Mexico decree under the general rules of comity, it could not do so by simply regarding its own previous order or judgment as a nullity, since its jurisdiction could not be divested by anything done by a court of another state. The Colorado court might, however, vacate its order, but, until it does so, the order must be obeyed. If facts arise which would justify a vacation of the order, that is no excuse for disobeying the order. The remedy of the party desiring to be relieved from the necessity of obeying the order is to take formal and due steps in the proceeding in which the order was made, and not to impeach the order in contempt proceedings brought to punish a disobedience thereof. State ex rel. Tuthill v. Giddings, 98 Minn. 102, 107 N. W. 1048; 13 C. J. 44, § 59."

Here the appellants are relying on a decree of a state court to justify their disobedience of the Federal Court decree of 1906. But the state court decree is void. The decree of the Federal Court is still in force and the state court decision cannot affect it or justify appellants in disobeying it. Appellants are bound to obey the Federal Court decree until such time as it is modified or vacated in a proper proceeding before that court.

2. Appellants Failed to Show a Change of Conditions Justifying Their Violation of the Federal Court Decree.

Appellants argue at page 36 of their brief that the only burden on them was to show that the issues decided by the state court in 1944 were the same as the issues in this proceeding, and having established that fact, the state court decree is res judicata and purges them of contempt. Whether that be true or not (De La Mater v. Graves, (Colo.) 193 Pac. 552 (supra) holds that it is not) need not be decided, since, as heretofore shown, the state court decree was void and of no effect for any purpose. If it be contended that conditions have changed since 1906, justifying a disobedience of the Federal Court decree, the burden is upon appellants to show such a change in conditions.

17 C. J. S. 111.
National Labor Relations Board v. Fed. Bearings Co., 109 Fed. (2d) 945.

The burden of proving an injury by the change in point of diversion, if there was an injury, was upon appellants.

Thrasher v. Mannix & Wilson, 95 Mont. 273, 26 Pac. (2d) 370.

Jacob v. Lorenz, (Cal.) 33 Pac. 119.

Appellants introduced some evidence tending to show that Piney Creek was not a tributary of Sage Creek, and that if it was it did not make any beneficial contribution to Sage Creek. Such testimony was controverted by appellee and the trial court found in appellee's favor on these points. Apparently appellants admit that their evidence was insufficient in that connection as they claim no error therein.

Appellants also contended in the lower court that appellee, by changing his point of diversion from the main stream to only one tributary of that stream, ipso facto lost the whole of his prior right. Apparently appellants are now satisfied that they were in error in that connection since they make no such contention before this Court.

It is of course well recognized that an appropriator may, without losing his priority, change his point of diversion if the rights of others will not be materially injured or prejudiced. Changing the point of diversion upstream often benefits junior intervening appropriators due to the savings of water which would otherwise be lost by reason of evaporation, sinking, seepage, etc.

Ironstone Ditch Co. v. Ashenfelter, (Colo.) 140 Pac. 177, 182.

Crippen v. Glasgow, (Colo.) 87 Pac. 1073.

The same rules are applicable where the point of diversion is changed to a tributary of the main stream.

Spring Creek Irr. Co. v. Zollinger, (Utah) 197 Pac. 737.

The prior right is not lost unless junior appropriators are prejudiced. And there is absolutely no evidence in this case that the appellants were prejudiced. Judge Bourquin in the contempt proceedings of 1919 found that this change in point of diversion benefitted the appellants (Tr. 109) and there is no evidence that conditions have changed since that time. Appellants offered no evidence to show that there was any natural flow of water at the old point of diversion in Wyoming. There was none at the time of the contempt proceedings in 1919 (Tr. 106). If the point of diversion had not been changed the appellants would have been required to allow sufficient water to pass down Piney Creek to satisfy appellee's rights, which would be something over 110 inches, because of evaporation and sinkage. The move upstream, therefore, in the absence of a showing that there was now a natural flow of water at the old point of diversion, benefitted rather than prejudiced appellants.

The appellants wholly failed to sustain their burden of proof to show facts excusing their violation of the Federal Court injunction of 1906.

3. Appellee Proved the Charge of Contempt

The evidence discloses that about the middle of June, 1946, the appellants objected to appellee diverting any water from Piney Creek (Tr. 114); that appellee then demanded of appellants that they allow him to use the

water, but that they refused, relying on the state court decree (Tr. 114, 215, 247); and that as a result of being thus deprived of water appellee's crops were damaged (Tr. 114).

Appellants argue that since their points of diversion were below that of appellee, their verbal refusal to allow appellee to take any water, unaccompanied by affirmative acts, does not constitute contempt. Appellee is not able to agree with that contention and appellants cite no authority in support of their position. It is appellee's contention that appellants' verbal assertion of rights hostile to the Federal Court decree of 1906 was in contempt of that decree. It is to be noted that had appellee disregarded appellants' refusal he would have been running the risk of being cited for contempt of the state court decree. Under the circumstances appellants' refusal was just as effective as if they had blocked appellee's headgate or diverted all of the water above appellee's point of diversion.

To employ a subterfuge to evade a court decree constitutes a contempt (12 Am. Jur. 406). The state court decree constituted that subterfuge and the assertion of rights under that decree in hostility to the Federal Court decree and in direct violation thereof constituted a contempt of the latter.

It is to be further noted that the Federal decree of 1906 perpetually enjoined the appellants from "*in any manner* interfering with the rights" of the senior appropriator. (Tr. 89.) Certainly the acts of appellants were in contempt of that decree. The mere fact that appellants' points of diversion were downstream from appellee does not

permit them to flaunt the state court decree in direct violation of appellee's rights under the Federal Court decree.

CONCLUSION

The state court decree is void and no defense to this action since the water rights as between the parties were originally adjudicated in the Federal Court wherein appellants were perpetually enjoined from interfering with appellee's prior rights. The Federal Court retains jurisdiction in such a case to enforce its decree and no other court has jurisdiction to review, modify or annul that injunction.

Appellants violated the injunction of the Federal Court by asserting rights in violation thereof and refusing to allow appellee to divert the water to which he was entitled.

No change in conditions or excusatory facts were proved by appellants.

Appellee has endeavored not to unduly extend this brief. The question involved are fully considered in the opinion of the court (Tr. 272-283) and the question as to the jurisdiction of the state court is discussed at length by Judge Bourquin in Sain v. Montana Power Co., 20 F. Supp. 843, to which opinions the attention of the Court is invited.

The judgment must be affirmed.

Respectfully submitted,

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